Supreme Court, U.S.
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No. 90-1204

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EUGENE P. ECCLI, *Petitioner*,

v.

WILL VON KLEMPERER, *et al.*, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF

No. 90-1204

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PETITIONER'S REPLY BRIEF

The opposition brief by Respondents contains false information about this case and also overstates background information about Petitioner in an attempt to bring his credibility into question. Moreover, the issues raised in the Petition For Writ Of Certiorari are evaded, despite the requirement of Supreme Court Rule 15.1 that Respondents address them in their Opposition brief, by a mere parroting of portions of the District Court's opinion.

Most of the issues raised in the Opposition brief have already been dealt with in the Petition For Writ Of Certiorari (hereinafter "Petition"). To the extent that certain arguments are first raised in Respondents' Brief In Opposition (hereinafter "Opposition"), this reply will deal with them.

ALLEGED FRIVOLITY OF THE PETITION

Respondents claim that the Petition is

inherently incredible, completely irrational, and demonstrates a desperate need for psychiatric treatment (Opposition, at 6). This characterization of Petitioner is considerably overstated. Respondents in their Opposition brief are using preliminary findings by certain evaluators which a State court relied on for a specific purpose, namely, to facilitate more thorough evaluation of Petitioner.

Petitioner remains *sui juris*, and was described as not dangerous, stable, and euthymic (i.e. well in spirit) by those responsible for his extensive evaluation over several days (Petition, at 13-15). Petitioner asks the Court, in the interests of justice, to recognize the difficulty of presenting one's charge of corruption to a system in which those explicitly accused of corruption play a chief role, United States v. Means, 627 F.Supp. 247, at 269 (D.SD 1985).

The issue of credibility Respondents now wish to raise was not before the District

Court despite the fact that Respondents had an opportunity to do so. This information does not present a balanced view of Petitioner and results in the danger of unfair prejudice (Petition, at 39-40).

While it is undoubtedly true that the Court has the power to dismiss a Petition as frivolous, the attempt by Respondents to use 28 U.S.C. § 1915(d) as an argument (Opposition, at 1, and 4-5) is inaccurate. Petitioner is acting *pro se*, he is not acting now nor did he act in the past *in forma pauperis*. The correct standard for paying litigants is that the appeal is frivolous when it lacks an arguable basis in law or in fact, Neitzke v. Williams, 490 U.S. 319, at 325 (1989). Fed.R.Civ.P. 11 was not designed to chill enthusiasm or creativity in pursuing factual or legal theories. The criteria is whether the papers in the appeal were based on a plausible view of the law. See Notes Of Advisory Committee On Rules: Fed.R.Civ.P.

11. Such plausibility has been demonstrated by numerous Shepardized citations in the Petition as well as the briefs in the Third Circuit which touch on every critical aspect of Petitioner's original complaint and his appeal.

The Constitutional and other legal points raised in the Petition, as well as those pointed out in the lower court proceedings, are not insubstantial because obviously without merit or because their unsoundness clearly results from previous decisions so as to foreclose the subject and leave no room for the inference that the legal points can be the subject of controversy, Ex Parte Poresky, 290 U.S. 30 ,at 32 (1933). The citations Petitioner has relied on involve all classes of people, in both governmental and non-governmental situations. These citations reflect good law which has stood the test of time. On the other hand, to argue that the Petition is without merit, Respondents must show that Petitioner could not prove any set of facts

which would entitle him to relief, Bogosian v. Gulf Oil Corp., 561 F.2d 434, at 444 (3rd Cir. 1977). cert den, 434 U.S. 1086 (1978); Hospital Building Co. v. Trustees Of Rex College, 425 U.S. 738, at 746 (1976). With the numerous citations in the Petition and in the proceedings in the lower Federal courts, it has not been possible to effectively argue lack of merit, and so Respondents resort to efforts at character assassination.

Finally, Respondents attempt an argument about protecting and preserving the orderly administration of justice, indicating there is a limit to the indulgence of the law (Opposition at 6). However, the citations used to support this argument are farfetched. They refer to troublesome cases where there was a high volume of appeals and motions by a Plaintiff, ranging from over 50 to several hundred, almost all of which were entirely without merit. Petitioner has filed only a few percent of the pleadings and other papers these cases had to deal with and has

acted in an orderly, step-by-step manner, throughout the appeals process. Also, these cases make reference to pleadings which are totally confusing so that the defendants literally could not frame an answer. Respondents in this case, on the other hand, could have filed a motion in the District Court proceeding for a more definite statement pursuant to Fed.R.Civ.P. 12(e) or the District Court could have ordered one *sua sponte* had it considered this a problem. Neither opportunity was acted on. This argument by Respondents is without merit.

MYTHOLOGY OF A DIVORCE CASE

Counsel for certain Respondents, namely Shanley & Fisher, repeatedly in the Federal case and the related non-matrimonial State court case claim that Hon. Isabel Stark, J.S.C. presided in a matrimonial action involving Petitioner. This overstatement has been pointed out three times, and yet Respondents continue to present partial information which

can have the effect of misleading the Court. In fact, Hon. Andrew P. Napolitano, J.S.C. presided over the final divorce proceeding. See Petition, at 15. Also, Petitioner was not represented by the Bergen County Mental Health Law Project during this matrimonial action. He represented himself *pro se* upon order signed by Hon. Conrad W. Krafte, J.S.C.

Respondents use this ploy of confusing the matrimonial action with Petitioner's detention for evaluation in an attempt to make it appear that Petitioner has used the case in District Court to try to prevent his wife from getting a divorce. Petitioner has never argued in any court that his wife should not be allowed in a timely manner to obtain a divorce which she freely desires. The reasons why Petitioner did not make this action a part of a matrimonial action have already been described in the Petition at 15-16.

At the divorce proceeding Judge Napolitano

was made aware of the existence of an action in State court and the appeal of the case in Federal Court. Petitioner there argued that these actions were separately adjudicable because they are based on a different set of facts, and the judge was explicit that the grant of divorce that day did not have a preclusive effect on these other actions, Tancrel v. Mayor And Council Of The Township Of Bloomfield, 583 F.Supp. 1548, at 1550 (D.NJ 1984). Also, it was not necessary for Petitioner to wait and rely solely on the outcome of the related non-matrimonial action in State court where procedural constrain made it doubtful that Constitutional issues would ever be considered. The Federal remedy is supplementary to the State remedy, and the latter need not first be sought and refused before the Federal one is invoked, Monroe v. Pape, 365 U.S. 167, at 183 (1961).

The other matters with respect to the related non-matrimonial case in State court have been addressed in the Petition, at 8.

Other "Issues" In The Opposition Brief

Respondents appear to falsely frame an alleged jurisdictional issue and then claim that Petitioner never addressed this "issue" in the proceedings below. Respondents claim (Opposition at 7) that the District Court in essence refused jurisdiction because the complaint alleged a cause of action under state law sounding in tort and a lack of complete diversity in the case. Petitioner interpreted the District Court opinion as indicating that, in the absence of complete diversity, there was sole reliance on Federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the original Federal complaint, based on a different legal theory than the complaint in State court, formally alleged overt acts in furtherance of a civil rights conspiracy which resulted in a deprivation of Constitutional rights (Petition, at 7A-8A). Petitioner in his brief before the Third Circuit presented precedent indicating that a Federal court could also exercise

pendent jurisdiction over a defamation-related State court case. Additional precedent located since then supports this view, Phillips v. Trello, 502 F.2d 1000, at 1005 (3rd Cir. 1974); Hagans v. Lavine, 415 U.S. 528, at 536 and 542 n.10 (1974). Alternately, because viola of international law has been alleged as a result of complicity in or incitement of torture by public officials, Federal courts do have jurisdiction to enforce this component of the Nation's domestic law, Filartiga v. Pena-Irala, 630 F.2d 876, at 882 n.11/article 7, 883, and 885 (2nd Cir. 1980); U.S. v. Buck, 690 F.Supp. 1291, at 1297 (S.D.NY 1988). The Fourteenth Amendment is a pledge of equal protection of the laws, Truax v. Corrigan, 257 U.S. 312, at 332-333 (1921).

Respondents also claim that Petitioner not only did not produce a copy of the alleged contract but also did not ask for its recision in the complaint in Federal court (Opposition at 5-6). In fact, Petitioner attached to his complaint in Federal court a copy of

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the related complaint in State court as background information wherein he did explicitly ask for recision (Opposition at App.2). Petitioner in his complaint in District Court also asked for a restraining order which would have had the practical effect of a recision (Opposition at App.6). Also, a written contract is not essential to a condition of peonage (Petition at 38). An alleged debt or otherwise is sufficient, because the offense primarily involves the control by which the personal service of one person is disposed of or coerced for another's benefit, Bailey v. State Of Alabama, 219 U.S. 219, at 241 (1910). Other forms of involuntary servitude, such as villeinage (e.g. a villein in gross or a villein socage) were established by social custom, and even though the "base" services may have had some economic value there was no need of a formal debt as a rationale. Rather the fealty and services were compelled by local habit or usage as if by ordinance similar to the way we think of custom or usage with respect to under color of state law in the context

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of the Fourteenth Amendment today, In Re Lewis, 114 F. 963, at 966 (N.D.FL 1902); 2 Blackstone Commentaries 61-62, 91, and 95.

What constitutes coercion is a question of fact, each case must depend on its own circumstances, and the character and conditions of life of the two parties are to be always considered, United States v. Clement, 171 F. 974, at 976 (D.SC 1909). The alleged therapeutic control of Petitioner's former spouse, in order to control my deviance because of a first-time, minor, out-of-character domestic violence offense, is an interactional approach to control which is virtually foreign to our legal system, D.B. Wexler, Therapeutic Justice, 57 Minnesota L.R. 289, at 301-302 (1972). It involves use of a non-penal statute for oppression. Attempts at camouflage using behaviorist psychology coupled with a defense based on alleged contributory negligence on her part are rather weak. Freedom to

control one's mind is the matrix, the indispensable condition, of nearly every other form of freedom; and liberty and justice cannot exist once the capacity for freedom of thought is virtually eliminated, Palko v. State Of Connecticut, 302 U.S. 319, at 326-327 (1937). "Innovative therapy" involving antipsychotic drugs or other biobehaviorial control techniques which can be psychologically addictive, M. Shapiro, Legislating The Control Of Behavior Control: Autonomy And The Coercive Use Of Organic Therapies, 47 S.California L.R. 237, at 263-264 (1974), can also be used to suppress conditioned avoidance behavior (Petition at 33). Its alleged use raises serious issues of informed consent, Weil v. Seltzer, 873 F.2d 1453, at 1458-1459 (D.C. Cir. 1989); J. Waltz & T. Scheuneman, Informed Consent To Therapy, 64 Northwest U.L.R. 628, at 635-643 (1970). Moral duress, in the sense of oppression or taking undue advantage of her resulting weakness, is also an important consideration in this case, Lafayette Dramatic

Productions v. Ferentz, 9 N.W.2d 57, at 65-66 (S.Ct.MI 1943).

Petitioner provided ample citations in the lower court proceedings to indicate that his injuries were personal (distinct, palpable, and clearly within his zone of interest), traceable, and redressable. He should have standing with respect to the cumulative impact of the counts in the complaint, Allen v. Wright, 104 S.Ct. 3315, at 3324 (1984). See also Petition at 18.

The only real basis for summary judgement in the District Court was the self-serving denials of Respondents and the denial in an affidavit by Sandra Eccli, who as a defendant in the related non-matrimonial State court case, had an interest in the subject matter of the litigation. The mere fact that a witness is interested in the result of the suit has been deemed sufficient to require the credibility of the testimony to be submitted to the jury as a question of fact, Sartor

v. Arkansas Natural Gas Corporation, 321 U.S. 620, at 628 (1944), reh'g den, 322 U.S. 767; Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, at 408 (1899).

Respondents allege that errors with respect to jurisdiction and standing in the District Court's opinion are harmless because the claim is beyond proof. This ignores the fact that Petitioner has a right to discovery even if recovery appears unlikely (Petition at 38). It also ignores the possibility, if necessary, of amendments to conform to the evidence pursuant to Fed.R.Civ.P. 15(b) or supplemental pleadings pursuant to Fed.R.Civ.P. 15(d) at the conclusion of an ample opportunity for discovery. Moreover, Respondents' argument presents a confused view of the breadth of experience and power the Federal judiciary has, in the interest of substantial justice, to adopt special procedures pursuant to Fed.R.Civ.P. 16(c)(10) in cases where there are complex issues and unusual proof problems. A cursory review of the Federal Rules Of Evidence reveals

the shallow and conclusory nature of their argument; Rule 607 dealing with impeachment of witnesses, Rule 608 dealing with evidence of the character and conduct of a witness several years ago contrasted with her behavior currently, and Rule 804(3) dealing with statemen against Respondents' own interests, to mention but a few possibilities. In a civil case such as this, only the preponderance of the evidence is required to obtain an equitable remedy.

Also, this Court does have the power to adjust State domestic relations laws when unconstitutional means have been employed, Santosky v. Kramer, 455 U.S. 745, at 768 n.18 (1982). Further, there is no necessarily irreconcilable conflict between a Constitutionall proper interpretation of current New Jersey domestic violence statutes and the remedy which Petitioner seeks.

There is precedent for allowing a period of about one year prior to summary judgment to assure an ample, full opportunity for

discovery, rather than the few months Petitioner had available, Dowling v. City Of Philadelphia, 855 F.2d 136, at 137 (3rd Cir. 1988); Celotex Corp. v. Catrett, 106 S.Ct. 2548, at 2550 and 2554 (1986). See also Petition at 36-38.

The temptation has been to assume Petitioner was dilatory with discovery, which was all the more attractive an hypothesis when Respondents did everything possible to cast doubt on his credibility and characterize the case as a matrimonial action. He was merely slowed in discovery by limited financial resources and the further need while holding two jobs of doing extensive research so he could oppose on legal grounds a motion for dismissal pursuant to Fed.R.Civ.P. 12(b)(6) which was pending in the same timeframe as the premature motion for summary judgment. Summary judgment should have been used most sparingly in a First Amendment case such as this involving delicate Constitutional rights, complex fact situations, disputed testimony, and questionable credibilities,

Porter v. Califano, 592 F.2d 770, at 778 (5th Cir. 1979).

The situation Petitioner alleged in his complaint is not merely socially regressive with respect to the minimal set of civil rights assured by the Fourteenth Amendment to every person who sets foot within the jurisdiction of this country. From a public health perspective it is increasingly suicidal, S.O. Sevgi and K.K. Holmes, "Sexually Transmitted Diseases In The AIDs Era", Scientific American, 264, No. 2 (February 1991), 68-69. Factors to be considered appear to include the detriment the State is imposing on the woman, by forcing her into a distressful lifestyle and future, which is likely to tax her mental and physical health, Roe v. Wade, 93 S.Ct. 705, at 727 (1973).

CONCLUSION

Petitioner's case is justiciable. Ample, full discovery should have been allowed prior to the grant of summary judgment. The Writ Of Certiorari should be granted.

Respectfully submitted,

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